SUPREME COURT FOR THE UNITED STATES OF AMERICA

OCTOBER 1994 TERM

(1)

Supreme Court, U.S.
FILED

Case No.

94 813 JUN 30 1994

OFFICE OF THE CLERK

LUIS FERREL,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Normando R. Pacheco #5296
1900 Grant Street, #610
Denver, Colorado 80203
(303) 861-9200
Attorney for Petitioner

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court committed error in failing to find that the Government was required to file a 5K1.1 downward departure as a result of the Appellants cooperation with the Government and therefore the Trial Court committed error in finding that no downward departure would be granted to the Appellant Luis Ferrel.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel on behalf of the Appellant Luis Ferrel, submits the following interested parties exist in the matter.

For the Defendant Luis Ferrel, Normando R. Pacheco Esq., 1900 Grant Street, Suite 610 Denver, Colorado 80203; For the Government Wayne Campbell Office of the U.S. Attorney 1961 Stout Street, Denver, Colorado 80294.

The Honorable Clarence Brimmer United States District Court Judge.

TABLE OF CONTENTS

	Page
PETITIONERS STATEMENT CONCERNING JURISDICTION	iv
DATE OF ENTRY OF JUDGMENT	iv
DATE OF REHEARING	iv
LEGAL AUTHORITY	1
STATEMENT OF FACTS	1-4
ARGUMENT	5-9

TABLE OF AUTHORITIES

Page

STATUTES

21 U.S.C.S. §841 (A) (1) 2
21 U.S.C.S. §846 2
2D1.1 1
5K1.1 6
18 U.S.C.S.§3553 (e) 8
18 U.S.C.S. §3553 (c) 11
28 U.S.C.S. §94 (N) 9

PETITIONER'S STATEMENT CONCERNING JURISDICTION

Petitioner Luis Ferrel, by and through his attorney submits that jurisdiction before this Court is proper. This is an appeal timely brought by the Petitioner Luis Ferrel, and that the Petitioner has exhausted remedies both before the United States District Court for the State of Colorado and that of the Tenth Circuit Court of Appeals.

DATE OF ENTRY OF JUDGMENT

The Defendant was sentenced on May 3, 1993 to a period of 60 months in the Bureau of Prisons and subsequent thereto the Petitioner filed in a timely fashion Notice of Appeal and the matter was then transmitted to the United States Court of Appeals for the Tenth Circuit on May 6, 1993.

DATE OF REHEARING

None

The Appellant's Petition for Rehearing was denied on or about March 9, 1994.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE No. 93-1155

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

LUIS FERREL,
DEFENDANT-APPELLANT.

RELATED APPEALS

There are no prior or related appeals.

LEGAL AUTHORITY

The Petitioner asserts that this Court has jurisdiction to review the Judgment and Opinion of the Tenth Circuit Court of Appeals wherein said Decision is in conflict with both Federal Sentencing Guidelines and Decisions from other circuits.

Said Decision therefore not being in conformity with the Supreme Courts prior opinions it is respectfully requested that the Court assume jurisdiction pursuant to Rule 10.1(a) of the Rules of the Supreme Court.

STATEMENT OF FACTS

This is an appeal taken from a plea which was entered by the Defendant-Appellant which was submitted to the Court and this plea was entered on or about February 10, 1993 before the Honorable Clarence Brimmer United States District Court Judge.

The sentencing occurred on May 3, 1993 before The Honorable Clarence Brimmer sitting by designation for the District Court for the District of Colorado.

The Court imposed a sentence of 60 months which it believed to be the minimum sentence which it could impose for violation of 21 U.S.C. §841(a) (1), (b) (1) (B) and §846 to the statutory authority relied on by the Court for sentencing indicated a sentence of not less than five years nor more than 40 years a fine of no more that Two Million Dollars or both.

A plea was entered to offenses which occurred from November 5, 1991 through and inclusive February 27, 1992.

As a result of the cooperation of this Appellant the co-defendant Chris Escobedo who was likewise charged in 92-CR-109-02 who was alleged to have violated the same statutory sections, was dismissed by motion filed by the Government on February 10, 1993.

The stipulated facts contained in the plea agreement indicated that on or about October 24, 1991 after Luis Ferrel had agreed with another to distribute cocaine that said Luis Ferrel knowingly sold over 500 grams to Leticia Cardenas of the Immigration Naturalization Service acting as a cocaine trafficker while an undercover officer.

Further the sentencing computations as submitted by each of the respective parties indicated at page 4 of the document that the resulting offense level would be an offense level of 23 which was a

downward departure from an adjusted offense level of 26 this was based on the 3 point offense level reduction as a result of the cooperation of the Government.

The final summary indicated that estimated offense level could conceivably be in a range of from 51 months to 125 months page 5 Presentence Investigation Report.

The Defendant prior to the sentencing submitted his objections to the Presentence Investigation Report and as a result the Office of the Probation Department through Kurt Pierpoint submitted alternative computations for the offense level of this defendant.

In his computations the Probation Department arrived at a total offense level of 23 with a criminal history of 0. The Defendant then filed with the Court its objection to the Presentence Investigation Report and requested that a downward departure take place as a result of cooperation as provided for in 5K1.1 of the Sentencing Guidelines.

On May 3, 1993 the Court took evidence from a representative of the Federal Bureau of Investigation Agent Mike Wonn.

The Government called Agent Wonn, in an attempt to establish that the Appellant was not entitled to a downward departure. On the testimony which was taken before the District Court several stipulated facts were arrived at;

1. That meetings did take place between the Agent, the Appellant Ferrel and the girlfriend of the Appellant Ms. Andreo pp.4 transcript Appellant Appendix.
2. That the Officer made no notes of the meeting. Appellant Appendix transcript pp.5.
3. That another gentleman was charged by the name of Chris Escobedo Appellant Appendix transcript pp.5. As the government indicated in the course of the testimony at pp.6 Appellant Appendix transcript by the U.S. Attorney "Now it was pretty much my offer that we would be glad to provide a 5K1.1 motion to Mr. Ferrel if he would cooperate entirely in our investigation and be debriefed and even submit to polygraph examinations and help with other individuals that he either knew by our investigation or being on the Title 3 wire receptions and that type of thing." Answer: "Yes".

The officer then indicated that there was a second debriefing

but was unable to recall the date. He did recall that there was specific talk concerning Chris Escobedo. During cross examination of the Agent the Agent testified that as a result of the debriefing of the Appellant a decision was made between the F.B.I. and the U.S. Attorneys Office not to proceed to trial in connection with Mr. Escobedo. The Officer admitted that as a result of the conference between the Appellant Ferrel, the Office of the U.S. Attorney and F.B.I. that a decision was made to dismiss the indictment against Chris Escobedo pp.11 Appellant Appendix transcript. At pp.13 of the Appellant Appendix transcript likewise Ferrel testified that he had sold an ounce of Cocaine to Escobedo and that the officer disbelieved him.

Upon direct inquiry by the Trial Court the Trial Court posed the question; "I take it this is an explanation of why the Government doesn't wish to make a motion to go below the guidelines". Response by the Government: "Yes your Honor" "Or below the mandatory minimum rather." Answer: "Yes your Honor." pp.16 Appellant Appendix transcript. As a result of the explanation the Trial Court Ruled in pertinent part To Defense Counsel: "While your argument points out what I believe to be one of the problems with sentencing guidelines and mandatory minimum sentences. When these guidelines and these sentencing minimums were first instituted, I appeared together with Judge Kane in this Court before the Sentencing Commission and testified against them. And one of the reasons why I testified against them was because I believe that these guidelines and mandatory minimums passed the discretion from the Judges of the Court to the U.S. Attorneys Office. The U.S. Attorneys Office is now given the discretion in criminal case to determine by what charges are filed whether or not to make a motion to go below the guidelines. And without the United States making that motion the Courts hands are tied. It has no discretion. The discretion has been taken away from it. And this is one of the reasons why I have early objected to these guidelines and still do."

"But Mr. Pacheco, I have no right to go below the guidelines unless the Government makes a motion, and the Government in this case has not made the motion to go below the guidelines, and they have presented what appears to me to be a fairly good reason for not doing so. At least in their view. I suppose that if I was the Prosecutor, I would adopt that same view. So I can't say they have arbitrarily refused to exercise their discretion."

"Frankly I will tell Mr. Ferrel later might as well tell him now, that if I had the discretion, I would pass the mandatory minimum sentence in this case. But I feel that I have no choice. So I'm going to have to deny your objections to the Presentence Report and we'll go further." Appellant Appendix transcript pp.20-21.

SUMMARY OF ARGUMENT

The Trial Court did have the discretion to Rule that there was an arbitrary exercise of discretion by the U.S. Attorneys Office in failing to grant a 5K1.1 downward departure to the Appellant Luis Ferrel.

ARGUMENT

The Appellant asserts that pursuant to 5K1.1 of the guidelines as they existed on May 3, 1993 that the Defendant had met all criterion as required by that Statutory Enactment of Congress to have a downward departure to the sentence.

That pursuant to 5K1.1 the factors to be taken into consideration for a downward departure by the Trial Court is;

1. The Courts evaluation of the significance and usefulness of the defendant.
2. The truthfulness and completeness and reliability of the information provided by the Defendant.
3. That nature and extent of Defendant's assistance.
4. The injury or risk of injury to the Defendant as a result of said assistance.
5. The timeliness of the Defendant's assistance.

On the 21st of April, 1993 the undersigned counsel on behalf of the Appellant filed with the Probation Department Defendant's Responses to Presentence Investigation Report which is contained in the Trial Record. Of more importance is Appellant appendix transcript pp.2 paragraph 5 which indicated "that the undersigned counsel as an Officer of the Court is well aware of these threats which were made to the person of Mr. Ferrel, as a result of his consulting with members of the Federal Bureau of Investigation and the Office of the U.S. Attorney. Appellant Appendix transcript Paragraph 4 the U.S. Attorneys Office is aware as it relates to Appellant Appendix transcript paragraph 4 that the Defendant was threatened prior to the Trial date by persons acting on behalf of Chris Escobedo.

Therefore as it relates to the requirements of 5K1.1 more particularly the fourth element, that it was proven beyond a reasonable doubt that there was substantial injury or risk of injury to the Defendant as a result of his assistance.

The truthfulness and completeness and reliability of the information provided by the Defendant-Appellant can not be contradicted based on the fact that the Government as it indicated at the time of sentencing of Ferrel elected February of 1993 not to proceed as to co-defendant Chris Escobedo therefore there was supplied reliance as to the truthfulness, completeness and reliability of the information provided by the Appellant. More particularly the record clearly reflects the Appellants acceptance of responsibility and the fact that he indicated that he had prior cocaine transactions with co-defendant Escobedo.

As to the timeliness of the defendants assistance again it is beyond question that the Appellant did in a timely fashion assist the United States Attorneys Office in making a decision as to whether of not to proceed to trial as to co-defendant Escobedo.

The question therefore can only be determined as to the third element the nature and extent of the Defendant's assistance. During the cross examination of Agent Wonn, as outlined above there is no doubt that he offered to provide information both as to co-defendant Escobedo and to a person known as Chaco. The record does not indicate that there was a subsequent attempt made by the Office of the U.S. Attorney or the F.B.I. to debrief the Appellant as it related to these individuals.

Rather the Government elected to dismiss as to co-defendant Chris Escobedo and no subsequent filings have ever taken place against any other person who was required to be testified for or against by Appellant Ferrel.

In the application notes to the commentary of the sentencing guidelines as set forth in United States Sentencing Commission 1993 Edition, West Publisher the following commentaries are noted; Under the circumstances set forth in 18 U.S.C. 3553 (E) and 28 U.S.C. §94 (n) as amended, substantial assistance in the investigation or the prosecution of anther person who has committed an offense may justify a sentence below a Statutorily required minimum sentence. The sentencing reduction for assistance to authority shall be considered independently of any reduction for acceptance of responsibility.

Substantial assistance is directed to the investigation and prosecution of criminal activities by person other than the Defendant, while acceptance of responsibility is directed to the Defendant's affirmative recognition of responsibility for his own conduct. Substantial weight should be given to the Governments evaluation of the extent of the Defendant's assistance, particularly where the extent and the value of the assistance are difficult to ascertain.

As the third comment concerning substantial weight it is clear that based on the Governments evaluation of the extent of the Defendants assistance the Government elected not to prosecute Chris Escobedo and thereby impliedly recognized the extent and value of the Defendants assistance and avoided a trial to the Government.

Further in the sentencing notes at page 329 of the sentencing guidelines West Publication "A defendants assistance to authorities in the investigation of criminal activities has been recognized and practiced by Statute as a mitigating sentence factor. The nature, extent and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the Court on an individual basis. Latitude is therefore afforded the sentencing Judge to reduce a sentence based on variable relevant factors, including those listed above. The sentencing Judge must however state the reasons for reducing a sentence under this section 18 U.S.C. §3553 (c). The Court may elect to provide its reasons to the Defendant in camera and in writing under seal for the safety of the Defendant or to avoid disclosure of an ongoing investigation.

Therefore the statement by the Trial Court that it felt that it was bound by the lack of the Governments submitting a 5K1.1 downward departure is not authorized nor contemplated by the guideline.

Both in the commentary and in the background it is the sentencing Judge who is responsible for evaluating the nature, extent and significance of assistance provided by the Appellant.

It is the Appellants contention that based on the objective facts as it related to the criminal action 92-CR-109 that there was substantial significant and usefulness of the Defendants assistance.

SUMMARY

Based on the misapplication of the guideline by the Trial Court in its finding "That its hands were tied" by the Governments failure to file a 5K1.1 departure it is respectfully requested that the Trial

Court be instructed to consider downward departure in connection with said case based on the Appellants assistance to the Government in connection with this case.

Respectfully submitted this 27th day of June, 1994

Normando R. Pacheco #5296
1900 Grant Street, Suite 610
Denver, Colorado 80203
Telephone: (303) 861-9200

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 93-1155

UNITED STATES
OF AMERICA

Plaintiff-Appellee

versus

LUIS FERREL

Defendant-Appellant

APPENDIX

APPENDIX I	JUDGMENT
APPENDIX II	Tenth Circuit Opinion

UNITED STATE DISTRICT COURT
District of Colorado

Case Number 92-CR-109-1

UNITED STATES OF AMERICA
v.

LUIS FERREL
DEFENDANT

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, LUIS FERREL, was represented by Normando Pacheco.

On motion of the United States the court has dismissed count(s) 2 through 7.

The defendant pleaded guilty to count(s) 1. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
21 USC §841(a)(1)	Conspiracy to possess with intent to distribute and distribute cocaine.	11/5/91 to 2/27/92	1

As pronounced on May 3, 1993, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 4th day of May, 1993

CLARENCE A. BRIMMER
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months.

The Court makes the following recommendations to the Bureau of Prisons: That defendant be designated to FCI, Englewood, Colorado.

The defendant shall surrender to the United States Marshal for this district.

Defendant: LUIS FERREL
Case Number: 92-CR-109-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four years.

While on supervised release, the defendant shall not commit another federal, state, of local crime; shall not illegally possess a controlled substance; shall not possess a firearm or destructive device; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

2. The defendant shall participate in a substance abuse treatment and testing program as deemed necessary by the probation officer. The cost of the treatment program to be paid by the defendant. The defendant is to abstain from alcohol during treatment.

3. The defendant shall perform 50 hours community service as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. for schooling, training, or other acceptable reasons.

4) The defendant shall support his or her dependents and meet other family responsibilites.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 93-1155

UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

LUIS FERREL

Defendant-Appellant

ORDER
Entered March 9, 1994

Before KELLY and MCKAY, Circuit Judges, and
SEAY*, District Judge.

*The Honorable Frank H. Seay, Chief United States District Judge for the Eastern District of Oklahoma, sitting by designation.

This matter comes for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Chief Deputy Clerk

APPENDIX II

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-1155
(D.C. No. 92-CR-109)
(D. Col.)

UNITED STATES OF AMERICA

vs. Plaintiff-Appellee

LUIS FERREL

Defendant-Appellant

ORDER AND JUDGMENT*

Before KELLY and MCKAY, Circuit Judges,
and SEAY, District Judge.†

Defendant- appellant Luis Ferrel appeals from the district courts failure to depart downward from the Sentencing Guidelines. Mr. Ferrel was convicted of conspiracy to possess with the intent to distribute cocaine under 21 U.S.C. §841(a)(1). We have jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742(a) and we affirm.

The parties are familiar with the facts and issues presented by this appeal and we will not state them here. The district court refused to grant a downward departure under U.S.S.G. §5K1.1

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, and order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993._____F.R.D._____

† The Honorable Frank H. Seay, Chief United States District Judge for the Eastern District of Oklahoma, sitting by designation.

because it believed it lacked the power to do so in the absence of a motion for such departure by the government.

We review de novo the district court's interpretation that a particular sentencing guideline does not permit a downward departure. United States v. Lowden, 900 F.2d 213, 217 (10th Cir. 1990). Under §5K1.1 of the Sentencing Guidelines, while the government may seek a downward departure for a defendant's cooperation, such power or discretion is not given to the court imposing sentence. United States v. Long, 936 F.2d 482, 483 (10th Cir.), cert. denied, 112 S. Ct. 662 (1991). A court possesses the power to review the government's actions if the government promised in a plea agreement that it would seek such departure, United States v. Kelley, 956 F.2d 748, 755 (8th Cir. 1992), or if the government fails to move for departure for unconstitutional reasons. Wade v. United States, 112 S. Ct. 1840, 1843-44 (1992). Neither occurred here.

AFFIRMED

Date stamped February 25, 1994

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge